STATE OF MICHIGAN

COURT OF APPEALS

GEORGE F. SCHULTZ, Plaintiff-Appellant,	UNPUBLISHED February 20, 2007
v	No. 271285 Court of Claims
DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant-Appellee.	LC No. 06-000022-MZ

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition to defendant Department of Environmental Quality (DEQ), under MCR 2.116(C)(7), based on its conclusion that plaintiff's claim is barred by the three-year limitations period for inverse-condemnation claims filed in the Court of Claims. We affirm.

I. FACTS

On April 18, 1991, plaintiff applied to the Department of Natural Resources (the predecessor organization to the DEQ) in order to construct a home on a lot that was all-wetland property. He proposed to build a home on pilings with an attached garage and an access drive, but this original proposal was denied. On November 25, 1996, defendant, after a formal hearing, submitted a final determination and order that entitled plaintiff to a modified permit if he granted defendant a conservation easement over the entire undeveloped portion of the parcel. Plaintiff agreed to comply with the terms and conditions of the final order by signing a draft permit on February 6, 1997. Plaintiff submitted several proposed conservation easements, which were all rejected by defendant. Defendant contends that the first document submitted by plaintiff did not meet the conservation easement condition and allowed for supplementary structures that were not a part of the final order: a path, a boardwalk, and a deck. Plaintiff failed to provide an appropriate proposal during the next two years—due to similar problems as the first proposal—so defendant closed the application file on September 22, 1999.

On August 27, 2001, plaintiff filed a motion to compel compliance with the final determination and order from 1996, which was denied. Plaintiff then appealed that denial to the Ingham Circuit Court. On November 5, 2002, the parties reached an agreement that plaintiff would file a conservation easement within 30 days; and if defendant denied the proposal, it

would provide reasons for its decision. If the exchange proved unproductive, then the parties would return to the court for a ruling. Plaintiff submitted several proposals during the next two years and defendant rejected each proposal because they continued to exempt areas other than the location of the house, garage, and driveway from the conservation easement.

Plaintiff filed the instant action in the Court of Claims on February 15, 2006, alleging an unconstitutional taking of his property, and defendant moved for summary disposition. The trial court granted the motion for summary disposition, concluding that plaintiff's claim was barred by the three-year limitations period for inverse-condemnation claims filed in the Court of Claims. Plaintiff now appeals.

II. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition. We disagree.

A. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. If no facts are in dispute, and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is time barred by the statute of limitations is a question of fact for the court as a matter of law. However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. [*Federated Ins Co v Oakland Co Rd Comm*, 263 Mich App 62, 66; 687 NW2d 329 (2004), quoting *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997), quoting *Baker v DEC Int'l*, 218 Mich App 248, 252-253; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich 247 (1998) (citations omitted).]

Likewise, we review de novo a trial court's grant of summary disposition based on the expiration of the limitations period. *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 5; 704 NW2d 69 (2005).

B. Analysis

(1) Limitations Period

Plaintiff first argues that the trial court erred in concluding that a three-year limitations period applies to this case. Specifically, plaintiff asserts that the proper limitations period for his inverse-condemnation claim is 15 years. We disagree.

This Court has held that a three-year limitations period applies to inverse-condemnation claims filed in the Court of Claims. *Gleason v Dep't of Transportation*, 256 Mich App 1; 662 NW2d 822 (2003). While plaintiff acknowledges that *Gleason* is binding under MCR 7.215(J)(1), he argues that it was wrongly decided. Plaintiff also contends that *Gleason* is inconsistent with prior decisions of this Court applying a 15-year limitations period to inverse-condemnation claims, and he asks this Court to convene a conflict panel to address the issue. We reject plaintiff's arguments because we believe that *Gleason* was properly decided and that it does not conflict with this Court's binding precedent.

In *Gleason*, the plaintiffs argued that the trial court's application of a three-year limitations period to their inverse-condemnation claim violated their right to equal protection because a six-year limitation period applies to all entities other than the state in inverse-condemnation actions. *Gleason, supra* at 2. Here, plaintiff argues that this Court applied an improper standard of review to the plaintiff's taking claim in *Gleason*. He contends that because property rights and an owner's right to compensation are fundamental, this Court should have applied a strict-scrutiny standard to the plaintiff's claim; rather than the rational-basis standard that was applied. And plaintiff further argues that if this Court had applied the correct strict-scrutiny standard, it would have concluded that the 15-year limitations period in MCL 600.5801(4) applies to inverse-condemnation claims filed in the Court of Claims.

However, this Court did not apply the wrong standard of review in *Gleason*. Statutes of limitations are considered to be procedural, rather than substantive, requirements. *Gleason, supra* at 2, citing *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978). We will uphold procedural requirements unless they "'are so harsh and unreasonable in their consequences that they effectively divest the plaintiffs of the access to the courts intended by the grant of the substantive right.'" *Id*., quoting *Forest, supra* at 359. Plaintiff's fundamental rights were not abridged because of the barring of his claim by the three-year statute of limitations. As stated in *Gleason*, the "substantive right to compensation when private property is taken for public use is wholly unaffected by the procedural requirement that the action be brought within three years of its accrual." *Id*. at 2-3.

Plaintiff further contends that the three-year limitations period in *Gleason* conflicts with this Court's prior decisions, which plaintiff asserts hold that a 15-year limitations period applies to inverse-condemnation claims. To support his contention, plaintiff refers this Court to the following cases: *Difronzo v Port Sanilac*, 166 Mich App 148; 419 NW2d 756 (1988); *HRT Enterprises v Detroit*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 12, 2005 (Docket No. 252858), slip op at 2; and *Fruman v Detroit*, 1 F Supp 2d 665, 680 n 6 (ED Mich 1998). However, *Gleason* does not conflict with any of these cases because they are not binding on this Court, MCR 7.215(J)(1), and because the facts of each are distinguishable from this case.

(2) Tolling of the Limitations Period

Next, plaintiff contends that the trial court erred by failing to toll the limitations period based on defendant's continuing violations in this case. Again, we disagree.

The continuing wrong doctrine allows for consideration of an otherwise untimely claim. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 246; 673 NW2d 805 (2003). "'"[W]here a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that the defendant's tortuous conduct continues."'" *Id.*, quoting *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 81; 592 NW2d 112 (1999), quoting *Horvath v Delida*, 213 Mich App 620, 626; 540 NW2d 760 (1995). To recover under the continuing wrong doctrine, the plaintiff must establish that continual tortious acts constitute a continual wrong. *Id*. Continual harmful effects from the completed act do not constitute a continuing wrong. *Id*. Further, the doctrine only applies in the limited cases of trespass, nuisance, and civil rights violations.[1] *Id*. at 247. Here, because plaintiff asserts an inverse-condemnation claim, the doctrine is not applicable. Therefore, the trial court did not err in refusing to apply the doctrine to toll the limitations period in this case (even if it did so for a different reason).

(3) Accrual of Plaintiff's Claim

Finally, plaintiff argues that even if a three-year limitations period applies to his inverse-condemnation claim, the trial court erred in concluding that his claim was not filed within three years after it accrued because his claim did not begin to accrue until May 27, 2003, at the earliest. We disagree.

Generally, a claim "accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. However, "[i]n an inverse condemnation action . . ., in which plaintiffs claim a continuous wrong by the condemnor, it is well-settled that the statute of limitations does not begin to run until the consequences of the condemnor's actions have stabilized. The precise point in time when the running of the limitation period is triggered is determined by the facts and circumstances of each case." *Hart v Detroit*, 416 Mich 488, 504; 331 NW2d 438 (1982) (internal citations omitted).

The parties do not dispute Michigan law regarding the accrual of an inverse-condemnation claim. Rather, they argue over whether certain events, which occurred after defendant closed plaintiff's file in 1999, constitute a "stabilization" of defendant's actions. Plaintiff asserts that his claim did not reach a period of stability until May 27, 2003, at the earliest, because it was then—after defendant again rejected his proposed conservation easements—when it became clear that defendant was not going to grant plaintiff a permit. Defendant, on the other hand, argues that plaintiff's file was permanently closed on September 22, 1999, or, at the latest, in 2001, after two administrative appeals confirmed defendant's final

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[1] We note that in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 284-285; 696 NW2d 646, amended by 473 Mich 1205 (2005), our Supreme Court rejected application of the doctrine of continuing wrongs to claims filed under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*, and the Handicapper Civil Rights Act, MCL 37.1101 *et seq*.

action. Defendant contends that this is when all actionable activity came to an end and the statute of limitations began to run.

In 1991, plaintiff filed an application with defendant to construct a home on a parcel of land containing wetlands. Defendant denied the application, and plaintiff sought review. On November 25, 1996, the Administrative Law Judge (ALJ) issued a "Final Determination and Order" (final order) granting plaintiff a permit to build, except that plaintiff "shall, as a condition of his permit under Part 303, grant a conservation easement to the Department on the entire undeveloped portion of land."

On March 30, 1998, plaintiff filed a motion to reconsider the aspect of the November 25, 1996 order that required plaintiff to grant defendant a conservation easement. Plaintiff claimed that this requirement essentially constitutes a taking of property without just compensation. In addressing the motion, the ALJ indicated that "[a] permit has yet to be issued in this matter, assumedly due to the Parties inability to agree on the language of the conservation agreement." The ALJ denied plaintiff's motion, holding that MCL 324.30312(2) provides authority to require a conservation easement, and, in dicta,[2] indicated that plaintiff's takings claim was without merit as plaintiff had been allowed to develop his property. Plaintiff did not seek further review of this decision.

In the meantime, plaintiff had submitted several conservation easement proposals to defendant. However, as mentioned by the ALJ, because plaintiff and defendant apparently disagreed on language of the conservation easement, defendant denied all of plaintiff's proposals. Despite plaintiff's continuing proposals, defendant, on September 22, 1999, closed the file on plaintiff's permit. Defendant maintains that it closed plaintiff's file because of inactivity, i.e., the failure to execute an acceptable conservation easement.

Rather than seeking review of defendant's decision to close the permit file, plaintiff, on August 29, 2001, filed a "Motion to Compel Compliance, which included a proposed conservation easement that plaintiff claimed, 'should be acceptable.'" The motion sought to reopen the file, and a requested a determination of an acceptable conservation easement. The ALJ issued an order and opinion on December 19, 2001, which concluded that although "a plausible argument can be made that [plaintiff] was aggrieved by the [DEQ]'s decision action of closing the file," "any right [plaintiff] had . . . lapsed after 60 days." The ALJ denied plaintiff's motion for compliance and specifically ordered that "[t]he closing of [the file] on September 22, 1999, constitutes that final agency decision in this matter." Further, that "[i]f the [plaintiff] intends to conduct a regulated activity on the subject parcel he must submit an application for a permit." Plaintiff sought reconsideration of this order, which was denied in written order and opinion, dated February 5, 2002.

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[2] "Generally speaking, an administrative board, commission or department possessing powers of such character does not undertake to determine constitutional questions." *Dation v Ford Motor Co*, 314 Mich 152, 159; 22 NW2d 514 (1946).

Plaintiff then appealed the decision to circuit court. Plaintiff requested that the circuit court reverse the ALJ's order denying plaintiff's motion to compel compliance and its order denying reconsideration of plaintiff's motion to compel compliance. Plaintiff essentially reiterated his request to the ALJ to reopen the file and to determine an acceptable conservation easement. The circuit court encouraged the parties to agree on a conservation easement. Plaintiff sent another proposed conservation easement to defendant. Defendant again rejected plaintiff's proposed conservation easement, specifically citing several aspects of plaintiff's proposal that did not comply with the final order. Defendant moved for summary disposition. The circuit court conducted a hearing on March 8, 2006, and granted the motion. In doing so, the circuit court specifically affirmed the ALJ's December 19, 2001 order and opinion, and the ALJ's February 5, 2002 order and opinion.

Plaintiff filed the instant action in the Court of Claims on February 15, 2006. The court dismissed plaintiff's claim for several reasons,[3] including plaintiff's failure to file his claim within the three-year period of limitations.

We agree with the Court of Claims that plaintiff's alleged inverse-condemnation claim accrued no later than December 19, 2001. On this date, the ALJ had issued an order and opinion stating that "[t]he closing of [the file] on September 22, 1999, constitutes that final agency decision in this matter." The order specifically indicated that "[i]f the [plaintiff] intends to conduct a regulated activity on the subject parcel he must submit an application for a permit." At this point, plaintiff could no longer acquire a permit based on his original application filed in 1991. Although plaintiff sought circuit court review of this ruling, the circuit court affirmed it. Thus, because the ALJ's December 19, 2001 order and opinion and February 5, 2002 order and opinion effectively denied plaintiff's permit, any potential inverse-condemnation claim based on the permit denial must have accrued at that time.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Bill Schuette

[3] Notably, the Court of Claims found that every conservation easement proposed by plaintiff did not comply with the ALJ's final order. The Court of Claims specifically commented on plaintiff's repeated proposals for conservation easements that allowed boardwalks, decks and planting, none of which were allowed under the ALJ's final order.